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Contractor Past Performance—Are We There Yet?

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Contractor Past Performance—Are We There Yet?

I. Introduction

During the United States federal government acquisition reform movement of the 1990s, the government strongly emphasized the use of past performance information to select contractors in federal procurements.[1] While past performance information was used in the federal procurement process before the 1990s,[2] federal agencies are now required to collect past performance information and prepare performance evaluations on nearly all major contracts[3] and use past performance as an evaluation factor in all source selections for major competitively negotiated contracts.[4] During the 1990s, Congress mandated that past performance become the most important evaluation factor after price.[5] Arguably the biggest reason for this increased focus on past performance was the basic idea that it is more likely for contractors with a solid past performance record to be successful in future contracts than those with a weaker past performance record.[6]

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[1] Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box* 29 PUB. CONT. L. J. 637, 638 (2000); see also United States General Services Administration (GSA), White Paper: Past Performance, Executive Summary, (1997), (herein, GSA White Paper) *available at* http://www.itpolicy.gsa.gov/mks/whitpr/pastwpes.htm (last visited Feb. 24, 2001); *see also* Ross W. Bransletter, *Acquisition Reform: All Sail and No Rudder*, 1998 ARMY LAW 3, 8 (1998) (questioning acquisition reform in general along with the manner in which past performance information is collected). Amongst the many changes brought on during the United States acquisition reform movement of the 1990s, this increased emphasis on past performance is considered to be one of the most significant changes. *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. ___ (forthcoming 2001) (manuscript at 12, note 22, on file with author) (the introduction of

(continued...)

Increasing the emphasis on past performance in government contracts because it is a good indicator of future performance makes sense and gen[illegible]ed positive feedback from both the

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"contractor past performance as...[required] evaluation criteria..." was one of the "most significant changes" of the 1990's reforms).

[2] *See infra* notes 28-37 and accompanying text discussing "responsibility determinations." Also, before this recent increased emphasis on past performance, several agencies used past performance as an evaluation factor though it was not required for use as an evaluation factor. John S. Pachter & Jonathon D. Shaffer, *Feature Comment -- Past Performance as an Evaluation Factor—Opening Pandora's Box,* 38 GOV'T CONTRACTOR ¶ 280 (June 12, 1996).

[3] Federal Acquisition Regulation (FAR), 48 C.F.R. § 42.1503(a) and 48 C.F.R. § 42.1502.

[4] 48 C.F.R. § 15.304(c)(3)(ii).

[5] Joseph D. West & Ronald. A. Schechter, *West Group Government Contracts 2000 Year in Review Conference: Conference Briefs—Past Performance*, Session 3, 3-1 (2001).

[6] Causey, *supra* note 1, at 639 (interestingly, Causey points out in note 12 however, that the idea that good past performance equals good future performance has not been fully tested and has even been challenged by one study); *see also* Notices—Office of Management and Budget, Issuance of Policy Letter 92-5, Office of Federal Procurement Policy (OFPP); Past Performance Information, 58 Fed. Reg. 3573 (Jan. 11, 1993) (past performance is a "key indicator for predicting future performance"). This OFPP policy letter was rescinded because it was incorporated into the FAR (65 Fed. Reg. 16968 (Mar. 30, 2000)). Note, the OFPP administrator at the time, Dr. Steve Kelman, believed that before the increased emphasis, the government used a "blank slate" approach and did not reward good contractors with any advantage during competitions in future procurements. Schooner, *supra* note 1, at 35 (citing STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE (1990)). Dr. Kelman also did not believe the government sanctioned contractors enough during competitions in future procurements. *Id.* at 35-36. Dr. Kelman viewed this approach as "dysfunctional" and wanted the Government to give preferential consideration to contractors who treated the Government well in the past and to avoid contractors who did not treat the Government well. *Id.* at 36. The OFPP is a Federal office whose administrator "provide[s] overall direction of procurement policy and leadership in the development of the procurement systems of the executive agencies" 41 U.S.C § 405(a) (1987). Note, the main goal of the new past performance system "is to collect and present accurate and relevant contractor performance information to the official[s] making [] source selection decision[s]," GSA White Paper, *supra* note 1, § 3.2.

government and industry.[7] Industry supports the use of past performance information because it agrees past performance can be a reliable indicator of the quality of future performance.[8] Theoretically, this should ensure a steady stream of repeat business for high-performing companies.[9]

Industry, however, has expressed concerns with the actual implementation of the increased emphasis.[10] These concerns are multi-faceted and temporally difficult to analyze. For example, while a contractor may first recognize a past-performance-related problem while competing for the award of a new contract, the problem may have stemmed from the collection of the performance information during the contractor's performance on a *previous* contract.

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[7] *See* Causey, *supra* note 1, at 642 (both federal agencies and contractors have supported the increased focus on past performance and most agree in using past performance to select the best contractors).

[8] *See* GSA White Paper, *supra* note 1, § 7 ("[i]n general, industry strongly supports the use of past performance in source selections...it can be a strong...predictor of future contractor performance"). Conceptually, industry believes the increased emphasis on past performance makes sense, however, the way the increased emphasis is implemented must be fair. Interview with Joseph D. West, Arnold & Porter, in Washington DC (Jun. 7, 2001).

[9] While this point on its face appears to be a positive aspect of the increased emphasis on past performance, it also raises a question as to whether past performance could pose a threat to the basic federal acquisition requirement of full and open competition. *See infra* notes 178-181 and 203-205 and accompanying text for more discussion on competition.

[10] *See infra* notes 118-131 and accompanying text for full discussion of industry concerns; *see also* Joseph D. West & Ronald A. Schechter, *West Group Government Contracts 1999 Year in Review Conference: Conference Briefs—Past Performance*, Session 14, 14-7 (2000) (in response to an American Bar Association (ABA) survey, no contractors stated they were "very satisfied" with the past performance evaluation process while 13% said they were "very dissatisfied" and 38% said they were "dissatisfied"). Interestingly, in response to the same survey, only 39% of the government respondents believed the system helped them select better contractors. *Id.*

In order to best analyze these industry concerns and where to resolve them, the analysis can be divided into two categories: 1) the collection and evaluation of past performance information and 2) the use of past performance information as an evaluation factor.[11] This bifurcation of past performance coincides with the FAR's implementation of the increased emphasis on past performance:[12] FAR Part 42 prescribes the policies and procedures for collecting and evaluating performance data on existing contracts.[13] FAR Part 15 contains instructions for using past performance as an evaluation factor in source selections.[14]

Industry concerns arise under both phases: FAR Part 42 collection and evaluation of past performance information and FAR Part 15 use of past performance as an evaluation factor in source selections. Once these concerns are identified, the bifurcation also provides a means for analyzing the best place to resolve industry concerns (i.e., under FAR Part 42 or FAR Part 15).

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[11] *See* West & Schechter, *2000 Year in Review, supra* note 5, at 3-1 and West & Schechter, *1999 Year in Review, supra* note 10, at 14-1 (these are "two distinct and important components" of past performance).

[12] *See generally* 48 C.F.R. Part 42 (entitled "Contract Administration") and 48 C.F.R. Part 15 (entitled "Contracting by Negotiation").

[13] *See* 48 C.F.R. § 42.15.

[14] *See* 48 C.F.R. § 15.304(c).

Addressing these industry concerns is important for maintaining the vital elements of competition, integrity, and transparency in our federal procurement system.[15] For example, due to the industry concerns discussed below,[16] industry might believe the changes in our procurement system brought about by the increased emphasis on past performance are not being administered fairly or correctly. Furthermore, industry may also believe contractors do not have a legitimate avenue to try to resolve their concerns. As a result, these concerns may begin to take their toll on the industry's view of our federal procurement system's transparency and integrity—which could eventually lead to a decrease in competition.[17]

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[15] *See* Schooner, *supra* note 1, at 4, 69, 103 (calling these three elements "established...norms that guide the procurement system" and "fundamental norms that define the procurement process"); *see also Developments: OFPP Nominee says Fundamental Concepts Must Not be Compromised for Efficient Procurement*, 43 GOV'T CONTRACTOR 20 ¶ 211 (May 23, 2001) (OFPP administrator, Angela B. Styles, also calling these three elements (along with "due process") "fundamental concepts").

[16] *See infra* notes 118-131 and accompanying text.

[17] *See* Causey, *supra* note 1, at 665 (if contractors view the past performance system as fair, they will be more likely to compete for future contracts); *see also infra* notes 189-205 and accompanying text for further discussion of these elements.

Before analyzing the concerns and where to resolve them, I begin by providing some pertinent background information. First, I will describe the term "past performance." I will then provide an overview of the history of past performance in the United States Federal procurement system. I then provide an example of one agency's past performance collection and evaluation procedures and its procedures for using past performance as an evaluation factor. I then describe the main avenues by which past performance issues are currently challenged—bid protests. I introduce the processes, standards of review, and sources of jurisdiction for the relevant federal judicial and administrative bid protest fora.

I next analyze the industry concerns associated with past performance and where the concerns might be resolved. From that I analysis, I find contractors lack a legitimate avenue to timely challenge FAR Part 42 collection and evaluation concerns. Until a change is made to the system, contractors likely will continue to use the established bid protest system to challenge all past performance issues outside of the agencies. Unfortunately for contractors, in addition to being an untimely avenue for FAR Part 42 concerns, bid protests contain other problems for contractors in challenging past performance issues.

Thus, while the increased emphasis on past performance makes sense, it is proving hard to implement.[18] This raises two questions: Do contractors need more in the area of past performance to address all of their concerns? And, if so, what would work best?[19]

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[18] *See, e.g.,* Schooner, *supra* note 1, at 35 (calling the increased emphasis on past performance one of former OFPP Administrator Dr. Steve Kelman's "most important initiatives" and yet "in implementation [one of his] most controversial policies").

[19] In a forthcoming article that I co-authored on this same subject, we conclude the article with (continued...)

In attempting to answer the question of whether contractors need something more, I utilize various measures to help determine whether the system needs to be changed. While the current system is admittedly efficient, other important measures are lacking in the system (i.e., timeliness, relevancy, and fairness). These measures are lacking due to contractors' inability to effectively and timely challenge FAR Part 42 collection and evaluation issues. Additionally, the current "efficient" method of dealing with contractor FAR Part 42 concerns may begin to negatively effect the perception of the fundamental norms of our procurement system: integrity, transparency, and competition.

Next, I review the advantages and disadvantages of keeping the status quo and the advantages and disadvantages of the various options for changing the past performance system to allow contractors a timely and effective challenge to FAR Part 42 concerns. I determine that a change is needed to correct this void in the past performance system for contractors. I conclude by finding that requiring alternative dispute resolution (ADR) at the various boards of contract appeals (BCAs) is the best option for allowing contractors a timely and effective avenue for addressing FAR Part 42 past performance concerns.

II. Background

A. What is Past Performance?

The FAR's definition section lacks a general definition of past performance.[20] FAR Part 42 however, provides a definition for "past performance information" applicable to the collection

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these two questions. Juan-Carlos Guerrero & Christopher J. Kirkpatrick, *Evaluating Contractor Past Performance in the United States,* 10 PUB. PROCUREMENT .L. REV. 243, 259 (2001).

[20] *See* 48 C.F.R. § 2.101.

and evaluation of past performance information under FAR Part 42:

> Past performance is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.[21]

This "past performance information" then forms the basis for using "past performance" as an evaluation factor for source selections under FAR Part 15.[22]

In order to more fully understand the concept of past performance in federal procurements, it is also important to distinguish past performance from "prior experience."[23] While the case law is conflicting as to whether prior experience is included as part of past performance evaluations, the two concepts require different inquiries and thus should be evaluated separately.[24] While evaluating prior experience, the government asks the contractor: "What have

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[21] 48 C.F.R. § 42.1501.

[22] *See* RALPH C. NASH, JR., STEVEN L. SCHOONER, & KAREN R. O'BRIEN, THE GOVERNMENT CONTRACTS REFERENCE BOOK, A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 385-86 (2d ed. 1998) (providing a definition of "past performance" and then stating that "past performance is evaluated on the basis of past performance information...").

[23] *See* Causey, *supra* note 1, at 641.

[24] *See* JOHN CIBINIC JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 736-37 (3d ed. 1998) (reviewing the conflicting case law and stating it is "essential that past performance and experience be evaluated separately"); *see also* Executive Court Reporters, Inc., B-272981, 96-2 CPD ¶ 227 (recognizing that while past performance and experience are "necessarily related," the criteria is different for each and accordingly, each was evaluated separately); *see also*, Causey, *supra* note 1, at 641 (past performance and experience are different and agencies should differentiate between them in source selection criteria). *But see* Telecom Sys., Inc. v. Dep't of Justice, GSBCA 13272-P, 95-2 BCA ¶ 27,849 ("unreasonable to suggest that past performance does not encompass experience").

you done?" "How many times or for how long have you done it?"[25] Past performance on the other hand, focuses on quality: "How well have you done it?"[26]

B. Past Performance Before the Increased Emphasis

The use of past performance information in federal government procurement is not a new development. In addition to having been used as an evaluation factor before the increased emphasis,[27] past performance-related factors have been significant in determining whether an offeror is a "responsible prospective contractor."[28]

The FAR dictates that agencies only award contracts to "responsible prospective contractors."[29] Using a fixed set of criteria,[30] responsibility determinations establish whether an awardee is qualified to serve as a government contractor.[31] The minimum requirements of

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[25] CIBINIC & NASH, FORMATION, *supra* note 24, at 737; *see also* RALPH C. NASH, JR., JOHN CIBINIC, JR., & KAREN R. O'BRIEN, COMPETITIVE NEGOTIATION, THE SOURCE SELECTION PROCESS 454 (2d ed. 1999).

[26] CIBINIC & NASH, FORMATION, *supra* note 24, at 737; *see also* NASH, CIBINIC, & O'BRIEN, *supra* note 25, at 454.

[27] *See supra* note 2.

[28] *See* 48 C.F.R. § 9.104-1(c) and William W. Goodrich, Jr., *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U. L. REV. 1539, 1541 (1998) (agencies have long been required to consider past performance in responsibility determinations).

[29] 48 C.F.R. § 9.103(a).

[30] 48 C.F.R. § 9.104-1.

[31] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 403 (in every Government procurement a determination must be made that the contractor is qualified to serve as a contractor--a responsibility determination is a technique used by the Government to avoid awarding to unqualified firms). Stated differently, to be found responsible, a contractor must be both "willing" (continued...)

responsibility include "a satisfactory performance record"[32] and "a satisfactory record of integrity and business ethics."[33] As a result, contractors' poor past performance have resulted in situations where contractors are found to be nonresponsible.[34]

In general, using past performance in a responsibility determination differs from using it as an evaluation factor in a source selection. At the time a responsibility determination is made, an "otherwise apparently successful offeror" has already been chosen from among the competition.[35] Thus, the responsibility inquiry is essentially a "yes or no" decision where no comparison is being made among the offerors.[36] In contrast, when past performance is collected and used as an evaluation factor during the earlier phases of the source selection process, past performance helps distinguish between offerors and serves as one basis for choosing an offeror over all the others.[37]

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and "able" to perform. David Z. Bodenheimer, *Responsibility of Prospective Contractors*, BRIEFING PAPERS, 97-9 (August 1997).

[32] 48 C.F.R. § 9.104-1(c).

[33] 48 C.F.R. § 9.104-1(d).

[34] *See* Bodenheimer, *supra* note 31 (listing a wide variety of circumstances where a contractor's past performance lead to a nonresponsibility determination).

[35] *See* Goodrich, *supra* note 28, at 1541.

[36] *See id.*

[37] Note, in some instances, "responsibility" may be determined in earlier stages of the procurement process. For example, if certain requirements are met (see 48 C.F.R. § 9.202(a)), agencies may use a pre-qualification system where responsibility is determined before solicitation (*e.g.* use of a qualified products list (QPL)). *See* NASH, SCHOONER, & O'BRIEN, *supra* note 22, at 400-01 and 428. Agencies may also choose a "lowest price, technically acceptable" source selection process where non-cost factors are given equal value and are used to determine whether a proposal is "technically acceptable." *See* 48 C.F.R. § 15.101-2 and CIBINIC & NASH, FORMATION, *supra* note 24, at 715-16. Award is then based on the "lowest evaluated price" of those proposals found (continued...)

C. Increased Emphasis on Past Performance

1. Policy

The increased emphasis on past performance officially began at the Office of Federal Procurement Policy (OFPP)[38] in Policy Letter 92-5.[39] The letter begins by providing a rationale for the increased emphasis: "a contractor's past performance record is a key indicator for predicting future performance."[40] The letter introduced two key requirements. First, executive agencies would be required to prepare past performance evaluations on all contracts exceeding $100,000.[41] Second, past performance would become a mandatory evaluation factor for awarding competitively-negotiated contracts[42] expected to exceed $100,000.[43]

2. Statute

Congress effectively ratified Policy Letter 92-5 in the Federal Acquisition Streamlining Act (FASA) of 1994.[44] Congress found that "[p]ast contract performance of an offeror is one of

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to be "technically acceptable." *Id.* Here again, responsibility is determined at an earlier stage of the procurement process. Past performance may or may not be taken into account in these situations. *See, e.g.*, 48 C.F.R. § 15.101-2(b)(1).

[38] *See supra* note 6 for an explanation of the OFPP.

[39] OFPP Policy Letter, *supra* note 6.

[40] *Id.* at 3575.

[41] *Id.*

[42] Note, this evaluation factor requirement is for competitively negotiated contracts where cost and non-cost factors are used as opposed to sealed bid contracts where price is the only factor.

[43] OFPP Policy Letter, *supra* note 6, at 3575.

[44] Pub. L. No. 103-355, 108 Stat. 3243, § 1091 (1994).

the relevant factors" in source selection decisions.[45] Further, "[i]t is appropriate for a contracting official to consider past contract performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract."[46] FASA also provided two procedural protections for contractors. First, FASA required all offerors be given an opportunity to provide relevant past performance information.[47] Second, FASA required neutral evaluations for offerors lacking any performance history.[48]

FASA also required the OFPP to provide past performance guidance to the executive agencies.[49] To that end, in May 1995, the OFPP issued an interim "best practices" past performance guide.[50] In May 2000, the OFPP issued a revised "best practices" past performance guide.[51]

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[45] *Id.* at § 1091(b)(1).

[46] *Id.*

[47] *Id.* at § 1091(b)(2).

[48] *Id. See infra* note 82 for a discussion of concerns pertaining to this "neutral evaluation."

[49] *Id.*

[50] Office of Federal Procurement Policy, *A Guide to Best Practices for Past Performance, Interim Edition* (May 1995) available at http://www.arnet.gov/BestP/BestPract.html (last visited Aug. 24, 2001).

[51] Office of Federal Procurement Policy, Office of Management and Budget, Executive Office of the President, *Best Practices for Collecting and Using Current and Past Performance Information*, (May 2000) (herein, OFPP New Guide) *available at* http://www.arnet.gov/Library/OFPP/BestPractices/pastpeformguide.htm (last visited Aug. 24, 2001).

3. Regulation—Federal Acquisition Regulation (FAR)

In 1995, the FAR incorporated the increased emphasis on past performance.[52] The increased emphasis was bifurcated between the collection and the evaluation of past performance information from existing contracts under FAR Part 42 and the use of past performance information in source selections under FAR Part 15.

a. FAR Part 42—The Collection and Evaluation Phase

FAR Part 42 establishes the rules and procedures for collecting and evaluating past performance information from existing contracts. Agencies must now prepare past performance evaluations for each contract exceeding $100,000.[53] The inputs for these past performance evaluations must generally come from the technical and contracting offices and from end users.[54] Once an evaluation is completed, the agency must provide the evaluation to the contractor as soon as practicable.[55] From the time the contractor receives the evaluation, the agency must give the contractor "a minimum of 30 days to submit comments, rebutting statements, or additional information."[56] Should a disagreement ensue over the past performance evaluation, the agency

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[52] *See* Federal Acquisition Circular (FAC) 90-26, 60 Fed. Reg. 16718, March 31, 1995 (establishing new requirements for past performance).

[53] 48 C.F.R. § 42.1502(a).

[54] 48 C.F.R. § 42.1503(a).

[55] 48 C.F.R. § 42.1503(b).

[56] *Id.*

must provide the contractor a level of review above the agency's contracting officer.[57] Nonetheless, the final result of the evaluation is ultimately the agency's decision.[58]

After the evaluation (and any contractor response or appeal to a higher level of review within the agency), copies of the evaluation and the contractor's response/appeal must be retained as part of the evaluation which is used to support future award decisions.[59] Lastly, these evaluations may not be released except to other government personnel and to the contractor[60] and the information in these evaluations must not be retained to provide source selection information for more than three years after the contract is completed.[61]

b. FAR Part 15—The Use as an Evaluation Factor Phase

FAR Part 15 provides the rules and procedures for the use of past performance as an evaluation factor in source selections. First and foremost, past performance must be an evaluation factor in all competitively negotiated procurements expected to exceed $100,000.[62] In contracts

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[57] *Id.*

[58] *Id.* As will become clear later in this thesis, this part of the implementation is what I believe needs to be changed. Essentially, contractors are stuck with the agency's call on a performance evaluation and their next (and only) opportunity to dispute the evaluation outside of the agency is through a bid protest. The bid protest may be a couple of years later and may involve an entirely different agency. *See infra* notes 152-159 and accompanying text for a complete discussion of the existing problems in using bid protests for past performance issues (especially FAR Part 42 issues).

[59] 48 C.F.R. § 42.1503(b).

[60] *Id.*

[61] 48 C.F.R. § 42.1503(e).

[62] 48 C.F.R. § 15.304(c)(3)(ii). Note, past performance is a mandatory evaluation factor except (continued...)

where past performance will be an evaluation factor, the solicitation for that contract must describe the approach the agency will take for evaluating past performance.[63] While evaluating a contractor's past performance, a contracting officer must consider the "currency and relevance of the information, source of the information, context of the data, and general trends in [the] contractor's performance."[64]

Contractors also have a chance to provide past performance information under FAR Part 15. Agencies must provide the offerors with an opportunity to identify similar past or current contracts and allow them to give information and corrective actions regarding any problems they had on those particular contracts.[65] Because agencies have the discretion to make contract awards "without discussions,"[66] however, contractors are not guaranteed an opportunity to explain any problems or any remedial measures taken in other past contracts.[67]

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when the agency contracting officer documents why past performance is not an appropriate evaluation factor in the procurement. 48 C.F.R. § 15.304(c)(3)(iv).

[63] 48 C.F.R. § 15.305(a)(2)(ii).

[64] 48 C.F.R. § 15.305(a)(2)(i).

[65] 48 C.F.R. § 15.305(a)(2)(ii). Note, the agency must also consider this information during the evaluation. *Id.*

[66] *See* 48 C.F.R. § 15.306(a). Even though "clarifications" to discuss the relevance of past performance and adverse past performance are allowed even when award is "without discussions," the agency is not required to allow these clarifications. 48 C.F.R. § 15.306(a)(2). Note, if an agency plans to award on initial proposals without discussions, the agency is required to provide notice of their intent to do so in the contract solicitation. 48 C.F.R. § 15.306(a)(3).

[67] *See, e.g.*, U.S. Constructors, Inc., B-272776, 99-2 CPD ¶ 14 (denying protest and stating that where an offeror "is on notice that the agency intends to make award based on initial proposals without discussions, we have no basis to object to a contracting officer's decision not to communicate with a firm regarding its performance history"). *But see* Causey, *supra* note 1, at (continued...)

c. Past Performance in Other Parts of the FAR

The use of past performance information is also suggested in other sections of the FAR. The FAR provides that past performance should be an important element for every evaluation in commercial item contract awards[68] and even contemplates the use of past performance in simplified acquisition procedures.[69] The FAR also suggests consideration of past performance in decisions to award orders under multiple award contracts.[70] Although these provisions are not mandatory, they demonstrate the growing importance of past performance in various areas of federal procurement.

D. Example of an Agency's Collection, Evaluation, and Use of Past Performance—The Department of Defense

A brief overview of an agency's "real-life" application of the increased emphasis on the collection, evaluation, and use of past performance will provide a useful background to the legal difficulties that can arise from the process. The Department of Defense (DoD) Guide (herein, DoD Guide) is a fairly well-developed example.[71]

661, citing A.G. Cullen, Inc., Comp. Gen. B-484049.2, 2000 U.S. Comp. Gen. LEXIS 21, Feb. 22, 2000 (the contracting officer must provide a contractor an opportunity to clarify past performance information "where there clearly is a reason to question the validity of the past performance information").

[68] 48 C.F.R. § 12.206. Commercial item contract procedures are normally easier and faster than non-commercial item acquisitions and are favored in the federal procurement system. *See generally* 48 C.F.R. Part 12.

[69] *See* 48 C.F.R. § 13.106-2(b)(2). Simplified acquisition procedures are for "low-dollar" contracts (i.e., between about $2500 and $100,000). *See* 48 C.F.R. § 2.101.

[70] 48 C.F.R. § 16.505(b)(iii)(A)(1).

[71] *See generally* Department of Defense, *A Guide to Collection and Use of Past Performance* (continued...)

During the FAR Part 42 collection and evaluation phase, the DoD attempts to measure aspects of existing contract performance–quality of the product or service, adherence to the schedule, cost control, and management and business relations.[72] A five-level rating scale is used to assess these elements: exceptional, very good, satisfactory, marginal, and unsatisfactory.[73] A contractor who *only* meets the contract requirements will earn a "satisfactory" rating.[74] A rating of "very good" or "exceptional" requires the contractor to exceed some or many of the contract requirements to the government's benefit.[75] Lastly, to help provide consistency in performance

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Information (May 1999) available at http://www.acq.osd.mil/ar/pastperf.htm (last visited Mar. 7, 2001). The "Past Performance Top Ten List," at page iv of the DoD Guide provides an interesting insight into what the DoD considers important in its past performance regime.

[72] *Id.* at 3 and app. D (these are called "assessment elements").

[73] *Id.* at 5 and app. F.

[74] *Id. at* app. F.

[75] *Id.* The DoD purposely structured the ratings this way to "incentivize and reward performers for being resourceful." *Id.* Such an approach raises fundamental questions. Government contracting normally seeks to procure the government's *minimum* requirements at the best value. A past performance regime that rewards contractors for exceeding requirements seems to change that calculation. Although the terms of a contract may still prescribe only minimum requirements, the import of the rating system seems to be that contractors who want the best chance for future awards should plan on exceeding those requirements. This could lead to the government using the higher ratings as leverage in order receive benefits not called for in the contract. *See, e.g.*, Causey, *supra* note 1, at 650 (agencies might use past performance evaluations as leverage to extract concessions from contractors). It does not seem fair or legal to change the basic terms of a government contract in this "backdoor" manner, especially insomuch as these "concessions" are "freebies." *See* Schooner, *supra* note 1, at 113-14 ("one of those most fundamental precepts of [f]ederal procurement is that you are not entitled to obtain a leg up on your competition" by offering or providing "freebies" to the government). Furthermore, contractors will not likely simply absorb the cost of going beyond the minimum requirements—instead they will likely charge it back to the government in the form of increased prices on all of their contracts. The DoD Guide tries to alleviate some of these concerns by explaining that "exceeding the requirements" refers to the quality and not scope of the work and that these assessments may not (continued...)

information collection across different procurement activities, the activities are divided into four "key" business sectors – systems, services, information technology, and operations support.[76]

In DoD's FAR Part 15 use phase, the past performance factors used "should be designed to evaluate the key performance requirements of the solicitation."[77] At a minimum, agencies should request each offeror's record for quality, timely delivery, and cost control.[78] These factors mirror three of the four categories in which performance information is collected during previously performed contracts.[79] The rating categories used in evaluating offerors' past performance also reflect the categories used in the collection phase.[80] A risk assessment is added to each of the rating categories–"unsatisfactory/very high performance risk," "marginal/high performance risk," "satisfactory/moderate performance risk," "very good/low performance risk," and "exceptional/very low performance risk."[81] There is also an "unknown performance risk"

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be used to obtain performance of tasks not required by the contract. *See* DoD Guide, *supra* note 71, at 5. Nonetheless, this scheme still raises some concerns. *See* GSA White Paper, *supra* note 1, § 7 (the fact that the contractor may have met or even exceeded the contract requirements but still not receive the highest ratings is an industry concern).

[76] DoD Guide, *supra* note 71, at 1 and app. B. Appendix B contains detailed definitions of the four key business sectors. Also defined are three "unique" business sectors—architect-engineering services, construction, and science and technology.

[77] *Id.* at 9.

[78] *Id.*

[79] *See supra* note 72 and accompanying text.

[80] *See* DoD Guide, *supra* note 71, at 10-11 and *supra* note 73 and accompanying text.

[81] DoD Guide, *supra* note 71, at 11.

rating for offerors with no known performance history.[82] Although the same rating terms appear in both the collection and evaluation phase and the use phase of past performance, a particular rating on a past contract (during the collection and evaluation phase) does not automatically translate into the same rating when that contractor's proposal is evaluated in a future source selection (during the use phase).[83]

This raises a key feature of the collection, evaluation, and use of past performance—the wide discretion given to contracting officials. For example, contracting personnel have discretion to determine: the methods from which to obtain past performance information,[84] the relevancy of the past performance information,[85] and the amount of weight to accord past performance in the

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[82] *Id.* (agencies must ensure that offerors with no past performance "are not evaluated favorably or unfavorably on past performance"); *see also* Pub. L. No. 103-355, 108 Stat. 3243, § 1091 (b)(2) (1994) and 48 C.F.R. § 15.305(a)(2)(iv). This "neutral" rating raises some concerns. Although both the statute and the regulation state that an offeror with no past performance record may not be treated favorably or unfavorably with respect to past performance, neither provides a method for doing so. Each agency must come up with their own method to treat such offerors fairly on a case-by-case basis. *See* OFPP New Guide, *supra* note 51, at 21. The result is that such offerors may or may not be treated fairly. Interestingly, the rescinded OFPP Policy Letter 92-5 calling for the increased emphasis on past performance clearly states: "if past performance is specified in the solicitation for offers as an award factor, a firm with a proven performance history generally would be preferred over a firm without a performance history, if all other factors were equal." OFPP Policy Letter, *supra* note 6, at 3574; *see also* Pachter & Shaffer, *supra* note 2 (an offeror with satisfactory past performance will likely be selected over one without any past performance).

[83] *See* DoD Guide, *supra* note 71, at 15 (assessment during "use" phase is based on subjective judgment and is not supposed to be a mechanical process or a simple function of an offeror's performance on a list of contracts).

[84] *See id.* at 2 (past performance information "can be obtained through a number of methods").

[85] *See id.* at 9 (agency officials have broad discretion in determining the relevancy of past performance); *see also*, Acepex Management Corp., Comp. Gen. B-283080, B-283080.2, B-
(continued...)

overall evaluation score.[86]

E. Bid Protest Fora

Because the bid protest system is an important component of my analysis of the best place to resolve past performance concerns, I will briefly review the available bid protest fora and the key jurisdictional and procedural details associated with each. Outside of the procuring agency,[87] there are two bid protest fora available: the General Accounting Office and the Court of Federal Claims.[88]

283080.3, 99-2 CPD ¶ 77 (agency has discretion to decide scope of offeror's performance history to be considered).

[86] *See* DoD Guide, *supra* note 71, at 10 (past performance should be given "sufficient evaluation weight").

[87] It is also possible to raise a protest regarding source selection issues at the procuring agency level. Parties are supposed to use their "best efforts" to resolve contests with the agency contracting officers. Exec. Order 12,979, 60 Fed. Reg. 55,171 (Oct. 25, 1995). While the procedures may vary from agency to agency, all agencies are required to have established procedures. *Id.* For purposes of this thesis, I will not discuss agency-level protests further because their effectiveness in handling past performance issues may vary depending on the agency. Furthermore, as discussed below, bid protests in general do not provide contractors with a timely avenue to address FAR Part 42 collection and evaluation issues.

[88] Until January 1, 2001, the United States Federal District Courts had explicit bid protest jurisdiction under the Administrative Dispute Resolution Act (ADRA), 28 U.S.C. § 1491(b) (1994). However, this jurisdiction had a "sunset provision" which provided that this jurisdiction would cease on January 1, 2001, unless further legislation was enacted regarding this issue. *See* notes to 28 U.S.C. § 1491(b) (1994). No such legislation was enacted—thus district court bid protest jurisdiction apparently no longer exists. Before the ADRA, the district courts had bid protest jurisdiction based on a Federal appellate court case—Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). Interestingly, a recent United States Court of Appeals case seems to imply that the district courts might still have "Scanwell jurisdiction" after the sunset of their ADRA jurisdiction. Iceland Steamship Co. Ltd.-Eimskip and Van Ommeren Shipping L.L.C. v. U.S. Dep't of the Army, 201 F.3d 451, 453 (D.C. Cir. 2000). However, this theory has not yet been tested. For purposes of this thesis, I will assume no district court bid protest jurisdiction exists.

1. General Accounting Office (GAO)

a. GAO Jurisdiction

The GAO derives its bid protest jurisdiction from two different sources--statutory authority and nonstatutory authority.[89] Under its statutory authority, the GAO may hear "protests" "concerning an alleged violation of a procurement statute or regulation."[90] "Protests" are written objections to a federal agency regarding the procurement of property or services.[91] The GAO also has "nonstatutory authority" arising from its general power to render advance decisions on payments by certain government officials.[92]

b. Who May Protest to the GAO?

Any "interested party" may have their protest decided by the GAO.[93] An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract."[94]

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[89] CIBINIC & NASH, FORMATION, *supra* note 24, at 1492.

[90] 31 U.S.C. § 3552 (1996).

[91] 31 U.S.C. § 3551 (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1492. Federal agency means "any executive agency." 40 U.S.C. § 472 (1986).

[92] *See* 31 U.S.C. § 3529 (1983); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1495-96.

[93] 31 U.S.C. § 3553(a) (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1496.

[94] 31 U.S.C. § 3551(2) (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1497.

c. GAO Standard of Review

The GAO standard of review requires a determination as to whether the challenged procurement decision "complies with statute or regulation."[95] The protester has the burden of showing that the procuring agency either violated a statute or regulation or used its discretion without a rational basis, in such a way that the protester was substantially prejudiced.[96]

d. GAO Remedies

Remedies provided by the GAO are technically not mandatory because the GAO can only recommend, not order, that an agency take action.[97] As a practical matter, however, agencies, motivated by the knowledge that non-complying agencies are reported to Congress annually, almost always follow GAO recommendations.[98]

Both nonmonetary, and to a limited extent, monetary remedies are available at the GAO. Nonmonetary remedies available at the GAO include issuing a new solicitation or awarding the contract consistent with the statute or regulation which was not followed.[99] The monetary remedies are more limited and only include the cost of filing and pursuing the protest (including

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[95] 31 U.S.C. § 3554(b)(1) (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1524.

[96] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 1524.

[97] 31 U.S.C. § 3554(b)(1) (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1529.

[98] 31 U.S.C. § 3554(e) (1996) and CIBINIC & NASH, FORMATION, *supra* note 24, at 1529.

[99] 31 U.S.C. § 3554(b)(1) (1996).

attorney, expert, and witness fees) and the cost of preparing the bid and proposal.[100]

2. Court of Federal Claims (COFC)

a. COFC Jurisdiction

The COFC also has two bases of bid protest jurisdiction. Under the Administrative Dispute Resolution Act (ADRA), the court can decide both pre- and post-award bid protests filed by "an interested party" challenging "a solicitation by a [f]ederal agency...for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[101] The court may also consider protests submitted by disappointed bidders based upon its Tucker Act jurisdiction over claims arising from "any express or implied contract with the United States."[102]

b. Who May Protest to the COFC?

Who can protest before the COFC depends on which jurisdictional basis is being asserted.[103] Under the ADRA, an "interested party" may protest to the COFC.[104] Unlike the GAO's jurisdictional statute which defines "interested party,"[105] the ADRA does not contain an

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[100] 31 U.S.C. § 3554(c)(1) (1996).

[101] 28 U.S.C. § 1491(b)(1) (1994).

[102] 28 U.S.C. § 1491(a)(1) (1994); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1536. The theory behind this jurisdiction is that the government has an implied contract to consider bids fairly and honestly. *See, e.g.*, Hero, Inc. v. U.S., 3 Cl. Ct. 413, 416 (1983).

[103] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 1540.

[104] 28 U.S.C. § 1491(b)(1) (1994).

[105] *See* 31 U.S.C. § 3551(2) (1996).

"interested party" definition.[106] While the COFC has treated the GAO definition as instructive in defining "interested party," the COFC has devised a broader, two-part "interested party" test: 1) the party must show some connection with the procurement and 2) the party must have some economic interest in the procurement.[107]

Under the Tucker Act's implied contract jurisdiction,[108] the COFC only has jurisdiction to hear a party's complaint if the party has submitted a responsive bid.[109] A party must bring this type of protest before award.[110]

c. COFC Standard of Review

The standard of review for COFC bid protests is grafted from the Administrative Procedure Act (APA).[111] Under the APA, the court sets aside agency procurement actions if it finds the actions to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[112] To satisfy this standard, the protester must show something more than mere negligence; for example, the protester must show bad faith or that there was no reasonable

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[106] *See generally* 28 U.S.C. § 1491(b) (1994).

[107] *See* Cubic Defense Sys. Inc., v. U.S., 45 Fed Cl. 239, 247 (1999); *see also* Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90, 102 (2000).

[108] 28 U.S.C. § 1491(a)(1) (1994).

[109] *See* Control Data Systems, Inc. v. U.S., 32 Fed. Cl. 520, 523-24 (1994).

[110] *Id.* at 523.

[111] *See* 28 U.S.C. § 1491(b)(4) (1994) (courts shall review agency decisions in accordance with 5 U.S.C. § 706 (1996)—part of the APA).

[112] 5 U.S.C. § 706(2)(A) (1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1552.

basis for the decision.[113] As in a GAO bid protest, the protester must demonstrate the Government's improper action prejudiced its chance for award.[114]

d. COFC Remedies

Nonmonetary and limited monetary remedies are available from the COFC. Nonmonetary relief (*i.e.*, declaratory and injunctive relief) is only available under the ADRA and includes preliminary and permanent injunctions.[115]

A limited monetary remedy of bid and proposal preparation costs are recoverable under both the ADRA and the Tucker Act.[116] Prevailing parties may sometimes also collect attorneys' fees under the Equal Access to Justice Act (EAJA).[117]

III. Industry Concerns with the Increased Emphasis on Past Performance

Industry concerns about the increased emphasis on past performance are multi-faceted and complex. Thus, in order to analyze the source of these concerns and where they might be best resolved, I split the analysis up into two categories: 1) collection and evaluation of past

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[113] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 1552 (citing Keco Indus. Inc., v. U.S., 203 Ct. Cl. 566, 574, 492 F.2d 1200 (1974)).

[114] *See* Statistica, Inc., v. Christopher, 102 F.3d. 1577, 1581, (Fed. Cir. 1996); *see also* CIBINIC & NASH, FORMATION, *supra* note 24, at 1554.

[115] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 1555-56 and 28 U.S.C. § 1491(b)(2) (1994).

[116] *See* CIBINIC & NASH, FORMATION, *supra* note 24, at 1558 and 28 U.S.C. § 1491(b)(2) (1994).

[117] *See* 28 U.S.C. § 2412(d)(1)(A) (1998) and CIBINIC & NASH, FORMATION, *supra* note 24, at 1557, 61.

performance information and 2) use of past performance information.[118] This bifurcation coincides with the FAR's treatment of the increased emphasis on past performance under FAR Part 42, collection and evaluation of past performance information[119] and FAR Part 15, use of past performance as an evaluation factor in source selections.[120]

A. Industry Concerns In General

Before splitting the industry concerns between FAR Part 42 and FAR Part 15, I will begin with an example of an industry concern pertaining to both phases of the increased emphasis of past performance: subjectivity. Contractors complain the past performance process is too subjective. For example, they find the definition of past performance information to be too subjective[121] resulting in too much discretion for contracting officers and inconsistent implementation.[122]

B. Industry Concerns Falling under FAR Part 42—Collection and Evaluation of Past Performance Information

Under the FAR Part 42 process of collecting and evaluating past performance, contractors

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[118] *See supra* note 11.

[119] 48 C.F.R. § 42.15.

[120] 48 C.F.R. § 15.304(c).

[121] *See* Causey, *supra* note 1, at 650 (discussing industry concern regarding the subjectivity of the definition—interestingly Causey also explains in note 81, that former OFPP administrator Dr. Kelman had a concern with the subjectivity but for a reason different than that of the industry—he was afraid evaluators would use the subjectivity to over inflate past performance scores); *see also* GSA White Paper, *supra* note 1, § 7.

[122] *See* GSA White Paper, *supra* note 1, § 7.

find it unfair that past performance assessment ratings essentially require them to do more than the contract calls for in order to receive anything higher than a "satisfactory" rating and they worry the government might use the collection process as leverage to extract concessions it might not otherwise receive.[123] Contractors are also concerned they might be downgraded for circumstances beyond their control[124] or for "bad reasons" (*e.g.*, with the past performance definitional focus on cooperation, customer satisfaction, and business-like concern for the customer's interest, contractors worry the government might downgrade their past performance for making legitimate complaints or filing legitimate claims).[125] Lastly, they fear that the performance evaluations may contain various inaccuracies.[126]

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[123] *See supra* note 75 and accompanying text for more discussion on this issue.

[124] *See* GSA White Paper, *supra* note 1, § 7.

[125] *See* Pachter & Shaffer, *supra* note 2. This past performance concern may "chill" contractor litigation because contractors may stop questioning the Government's actions in fear of hurting their past performance rating—they are now "obsessed with pleasing government evaluators." *See* Schooner, *supra* note 1, at 36-37, 87. As Professor Schooner also points out, the GAO has explicitly attempted to decrease the possibility of this "chilling effect." *Id.* at 37 (citing AmClyde Engineered Products Co., Inc., Comp. Gen. B-282271, B-282271.2, 99-2 CPD ¶ 5 and Nova Group, Inc., Comp. Gen. B-282947, 99-2 CPD ¶ 56. In AmClyde, the GAO stated in note 5 that "absent some evidence of abuse of process, agencies should not lower a firm's past performance evaluation based solely on its having filed claims." In Nova Group, the GAO opined that "it would be improper for contracting agencies to impose evaluation penalties merely for an offeror's having availed itself of the contract claims process, such as occurred here; imposing such penalties would create barriers to legal remedies created by Congress." Professor Schooner analogizes this concern with performance under award-fee type contracts where a contractor's fee is determined by how an agency official rates their performance. Schooner, *supra* note 1, at 37, note 91. This may lead to contractors following "[g]overnment directions without challenge." *Id.* (citing CIBINIC & NASH, FORMATION, *supra* note 24, at 1148-49).

[126] *See* Causey, *supra* note 1, at 650.

C. Industry Concerns Falling under FAR Part 15—Use of Past Performance Information as an Evaluation Factor

Under FAR Part 15 (use of past performance as an evaluation factor in source selections), contractors worry one bad review might preclude them from receiving future awards (causing a "de facto debarment").[127] They also have expressed concern that because of all of the discretion given to contracting officers with past performance, agencies might use past performance information in the source selection process that has little or no relevance to the contract at hand.[128] Furthermore, because the contracting officers have so much discretion in where to receive past performance information—e.g., telephone calls, etc.,[129] contractors are afraid they will not always know what past performance information is being used by the agency.[130] Lastly,

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[127] *See id.* (Causey raises the de facto debarment issue and after analysis, concludes the current FAR past performance procedures do not lead to de facto debarments); *see also* GSA White Paper, *supra* note 1, § 7 and Pachter & Shaffer, *supra* note 2.

[128] *See* GSA White Paper, *supra* note 1, at § 7; *see also* DoD Guide, *supra* note 71 at 9 (agency officials have broad discretion in determining the relevancy of past performance information).

[129] *See* 48 C.F.R. § 15.305(a)(2)(ii) (stating that the government shall consider past performance information provided by the contractor "as well as information obtained from *any* other source") (emphasis added); *see also*, DoD Guide, *supra* note 71, at 12 (stating that "[t]he [g]overnment should reserve the option...to consider other [past performance] information that may be evaluated).

[130] Interview with Mr. West, *supra* note 8. Mr. West further explained that while the government is normally supposed to allow the contractor an opportunity to comment on adverse past performance information for which they have not had a chance to respond, a communication gap exists—the government does not know what the contractor has had the chance to respond to and the contractor does not necessarily know what information the government is using. *See also* DoD Guide, *supra* note 71, at 13 (government must share adverse past performance information with contractors who have not had the chance to comment on it). During my interview with Mr. West, he provided his recommended solution to alleviate this concern. He called it a "Reverse Truth and Negotiations Act (TINA)" solution. *See generally* 10 U.S.C. § 2306a (1998). (continued...)

some concern exists that notwithstanding a "neutral rating," new contractors without any past performance will be kept from receiving awards.[131]

IV. Addressing Industry Concerns with the Current Past Performance System

Resolving industry concerns regarding past performance is important. Our procurement system works best when contractors perceive the system as open and honest. They also need an avenue where they can attempt to resolve concerns. All of this helps maximize competition in the system allowing the government to obtain high quality products and services at lower prices.

The concerns pertaining to the increased emphasis on past performance however, are temporally difficult to analyze due to the bifurcation of the increased emphasis on past performance: collection and evaluation of past performance under FAR Part 42 and use of past performance as an evaluation factor under FAR Part 15. As with the classic chicken and egg dilemma, it is not clear which came first or is more important. Nevertheless, all of the attention on past performance concerns seems to focus on bid protests—*i.e.*, when the contractors are

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Whereas TINA essentially looks to "level the negotiating playing field" by requiring contractors to disclose cost or pricing data, (*see, e.g.*, Hughes Aircraft, ASBCA 30144, 90-2 BCA ¶ 22,847 (goal of TINA is to put the government in an equal position with the contractor when making pricing judgments), Mr. West looks to make the "past performance playing field" more fair by requiring the government to disclose all past performance information that it will use on any future contracts. Mr. West further explained the system might be similar to that of the National Institute of Health (NIH) system where all contractor past performance is placed in a multi-agency shared computer filing system. (*See* West & Schechter, *2000 Year in Review*, *supra* note 5, at 3-3 to 3-4 for more information on the NIH system). Both contractors and the government would have continuous access to the system. Once the government posted past performance information about a contractor, the contractor would have the opportunity to attach comments. Only the government could use the information on this shared database (after the contractor had a chance to comment on the information) in any future contract awards.

[131] *See supra* note 82 for a discussion on the required "neutral rating."

competing for new contracts under FAR Part 15. At that point, it is late in the process to be raising collection and evaluation issues under FAR Part 42. In other words, a bid protest is not a timely avenue for a contractor to resolve concerns pertaining to the collection and evaluation of past performance under FAR Part 42. Furthermore, while FAR Part 42 provides more timely avenues for contractors to challenge collection and evaluation issues, for the reasons described below, these avenues are not necessarily effective for contractors in challenging FAR Part 42 collection and evaluation issues.

A. Addressing Industry Concerns Using FAR Part 42—Collection and Evaluation Phase—Problems for Contractors

1. Limited Timely Avenues

Currently, contractors wishing to challenge the FAR Part 42 collection and evaluation of past performance information in a timely manner have two potential choices. Both choices however, have severe limitations.

a. 30-Day Comment/Rebuttal Period

First, under the FAR, agencies are required to provide contractors with evaluations as soon as practicable and then give them "a minimum of 30 days to submit comments, rebutting statements, or additional information."[132] For any resulting disagreements over past performance information, the agencies must only provide a level of review above the contracting officer.[133]

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[132] *See supra* notes 55-56 and accompanying text.

[133] *See supra* note 57 and accompanying text.

The ultimate decision remains with the agency.[134] Thus, the value of this avenue to challenge FAR Part 42 collection and evaluation concerns is limited for contractors because the decision ultimately remains within the agency.[135]

b. Interim Assessments

Second, contractors may try to challenge the collection and evaluation of past performance under FAR Part 42 using interim assessments, if they are made available by the agency. The most recent OFPP Guide strongly suggests agencies use past performance to improve current contract performance (in addition to using past performance for future source selections).[136] To do this, agencies should create performance goals early in the contract[137] and provide for interim assessments and discussions regarding performance before the final past performance assessment is made.[138] These assessments should prompt better current contract performance by contractors and contractors should also know what to expect in their final past performance evaluation.[139] More importantly for contractors however, these assessments provide the opportunity to have an open dialogue with contracting officers concerning their performance

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[134] *See supra* note 58 and accompanying text.

[135] In other words, the contractors cannot immediately avail themselves of an unbiased, third party review.

[136] *See* OFPP New Guide, *supra* note 51, Forward.

[137] *See* West & Schechter, *2000 Year in Review*, *supra* note 5, at 3-2.

[138] *See* OFPP New Guide, *supra* note 51, at 4.

[139] *See* West & Schechter, *2000 Year in Review*, *supra* note 5, at 3-2.

evaluations.

However, the value of these assessments in providing contractors an avenue for challenging past performance collection and evaluation in a timely manner is somewhat limited. First, interim assessments are not required—they are merely suggested procedures. Second, if a contracting officer does not agree with a contractor's concerns, the contracting officer can just ignore the contractor's inputs and the contractor is left with no immediate recourse other than the agency review at one level higher than the contracting officer.

2. Decrease in the Acquisition Workforce

In addition to the problems associated with the limited timely avenues for contractors to challenge FAR Part 42 issues, contractors must deal with a shrinking federal workforce. Concurrent with the federal acquisition reforms of the 1990s, Congress dramatically cut the number of acquisition personnel working for the federal government.[140] This slashing resulted in an "understaffed and overworked" federal acquisition workforce.[141] This significant reduction in personnel has had negative effects on the federal procurement system including "insufficient staff(s) to manage requirements" and "insufficient contract surveillance."[142]

Logically, agencies will use their scarce resources where they are most needed.[143] This

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[140] *See* Schooner, *supra* note 1, at 54.

[141] *Id.* at 73.

[142] *Id.* at 29, note 69 (citing Office of the Inspector General, Department of Defense, *DoD Acquisition Workforce Reduction Trends and Impacts*, Report D-2000-088 (February 29, 2000)).

[143] *Id.* at 84.

means agencies likely will focus more on awarding new contracts than on administering current contracts.[144] Unfortunately, in the area of FAR Part 42 past performance collection and evaluation, this could mean less attention being paid to performance evaluations; fewer interim assessments being conducted; and less time being spent reviewing contractor comments, rebuttals, and additional information submitted within the allotted 30-day period after receiving a performance evaluation. This only amplifies the need for a timely avenue to challenge a past performance evaluation outside of the agency.

The good news is that the federal procurement workforce is receiving some attention. For example, Angela B. Styles, the OFPP Administrator, recently stated that she views the OFPP's role as important for making sure "procurement agencies make human capital management, as it relates to the contracting workforce, an integral part of their executive management responsibilities."[145] Additionally, the Procurement Executives Council (PEC) set as one of its strategic priorities for upcoming years (2001-2005) the creation of "an acquisition workforce of mission-focused business leaders" and more importantly "chartered working groups to research acquisition workforce needs, establish a [g]overnmentwide Acquisition Management Intern Program (AMIP), develop retention strategies and incentives, and determine the ideal skills and

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[144] *Id.* at 84. This is due to pressures from end users who are constantly looking for their new demands to be immediately filled with new contracts. Once the contract is awarded, the end user is temporarily satisfied with that issue and now needs a new contract for another demand. And so the cycle goes....

[145] *Developments*, *supra* note 15.

characteristics of the future acquisition professional."[146]

Notwithstanding this "good news," until actual changes are made to strengthen the acquisition workforce, the decreased size of the workforce remains a concern in the past performance area.

B. Addressing Industry Concerns under FAR Part 15—Use of Past Performance as an Evaluation Factor Phase—Bid Protests

In addition to being used as a means (albeit, belated), to challenge FAR Part 42 collection and evaluation issues, bid protests have been the primary vehicle for contractors to address FAR Part 15 concerns with past performance.[147] Although good reasons exist for contractors to use bid protests to challenge past performance issues, the bid protest system also has drawbacks for a contractor challenging past performance issues.

1. Positive Aspects Pertaining to Industry's Use of FAR Part 15 (Bid Protests) to Address Industry Concerns

The most obvious reason for industry to use bid protests to address past performance

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[146] Procurement Executives Council (PEC) Strategic Plan 2001-2005 (Strat Plan 2001-2005) *available at* http://www.pec.gov/Documents/PEC%5F2001%5F2005%2Epdf (last visited Aug. 24, 2001). The PEC "is an interagency council consisting of procurement executives in the Executive Branch...[using] their collective influence and knowledge to achieve the vision[s] for the Federal Acquisition System and...workforce." Procurement Executives Council Strategic Plan 2000, Mission for the Procurement Executives Council (Strat Plan 2000) *available at* www.pec.gov/Documents/Strategic2000%2Epdf (last visited Aug. 24, 2001). The PEC's role "is to set and achieve [g]overnmentwide acquisition priorities by leveraging knowledge and resources to meet the needs of its customers, to set a vision for progress, and to maintain the public's trust." Strat Plan 2001-2005.

[147] *See, e.g.*, GSA White Paper, *supra* note 1, § 7 (contractors disgruntled with the treatment of past performance in a contract "often turn to protests").

concerns is the availability of an established bid protest system.[148] In general, bid protests provide a familiar regime for both contractors and the government.[149]

The great amount of agency discretion involved with past performance is a another good reason to address past performance issues in bid protests. Government discretion in the procurement process is always accompanied by concern over its misuse, whether intentional or unintentional. Policing and remedying misuse of government discretion in the procurement process is a major purpose and justification for the existing bid protest regime.[150] To the extent that concerns about past performance are based on problems resulting from misused discretion in the use of past performance perhaps the appropriate place to address those concerns and remedy the problems is in the bid protest system.[151]

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[148] *See supra* notes 87-117 and accompanying text for discussion on the established bid protest system.

[149] *But see infra* notes 155-156 and accompanying text regarding the relative "newness" of the increased emphasis on past performance. The "newness" of this area of the law might negate the benefit (or at least some of the benefit) of having an "established bid protest system."

[150] This refers to the concept of protesters as private attorneys general. While this is far from the only justification for the bid protest system, it is one embraced by many. *See, e.g.*, Schooner, *supra* note 1, at 67 (defending the private attorney general concept). Private attorneys general are likely less expensive and more efficient than most alternative oversight mechanisms. *See id.* (bid protests are "cost effective" and less "labor intensive" than alternative mechanisms). The idea of bid protests as an oversight mechanism that checks government discretion also underlies other justifications for the system that have been suggested, including making bureaucrats obey the law (*i.e.*, fighting both corruption and incompetence), bolstering confidence to attract vendors, and demonstrating to citizens that government procurement is conducted in a fair manner. *See id.* at 71 (after discussing the fact that protests help work to correct "incidents of...illegal, arbitrary, or capricious agency action" pertaining to government contracts, Professor Schooner expresses concern that contract litigation numbers are down and asks "who watches the watchmen?").

[151] Naturally, for FAR Part 15 past performance problems centered around source selections, (continued...)

2. Potential Problems for Industry Using FAR Part 15 (Bid Protests) to Address Industry Concerns

a. In General

While the great amount of agency discretion involved with past performance is perhaps a reason to use bid protests to address past performance concerns, this discretion cuts both ways. The GAO gives great deference to agency decisions regarding the collection, evaluation, and use of past performance information.[152] In the GAO, an agency's actions are presumed to be correct and the protester must rebut that presumption in order to prevail.[153] Similarly, the COFC also gives such agency decisions great deference.[154] Ironically, these areas of large agency discretion

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remedies attendant to the source selection process (i.e., bid protests) seem most appropriate. But also, because a well-developed bid protest system already exists in the first place, perhaps it makes sense to define all past performance problems in such a way (as part of the source selection process) so that parties can take advantage of this familiar system in which to resolve them. Defining, or redefining, a problem in order to use a preferable remedy is hardly unheard of in the law. It may be particularly appropriate in the case of past performance problems, the definition and scope of which have not been definitively defined. Given an expansive and complex problem to which there are multiple points of entry, a beachhead must be established somewhere. The availability of the bid protest system may be a good reason to establish the beachhead in the FAR Part 15 source selection phase. Nevertheless, lack of timeliness is still a large problem for raising FAR Part 42 collection and evaluation issues in later source selections under FAR Part 15.

[152] *See, e.g.,* Young Enterprises, Inc., Comp. Gen. B-256851., B-256851.2 94-2 CPD, ¶ 159 (GAO inquiries into agency evaluation of proposals is limited to whether the agency was reasonable and consistent in its evaluation); *see also* Kimberly. R. Heifetz, *Striking a Balance Between Government Efficiency and Fairness to Contractors: Past Performance Evaluations in Government Contracts*, 50 ADMIN. L. REV. 235, 242 (Winter 1998) (GAO affords performance evaluations great deference).

[153] *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 478 (1995).

[154] *See, e.g.,* Keco Indus., Inc. v. U.S., 492 F. 2d 1200, 1203-04 (Ct. Cl. 1974) (standard used-
(continued...)

typically related to business judgement, are where the GAO and the COFC are least likely to intrude and most likely to afford deference to the agency to avoid second guessing its decisions. That juxtaposition yields a paradoxical result if policing of agency discretion is supposed to be one of the goals of the bid protest system.

Another problem with using the bid protest system for resolving past performance issues is the relative recency of the increased emphasis on past performance. Past performance issues are in some ways still "novel" in the bid protest realm.[155] The bid protest fora develop over time particular expertise and expectations about common protest grounds. After seeing the same issues repeatedly, the decisional authorities naturally develop analytical frameworks, explicit and implicit guidelines, and precedent. Indeed, the opportunity to develop specialized expertise is one of the main arguments for the existence of an administrative forum such as the GAO and an Article I court of limited jurisdiction such as the COFC. While such a system can reliably and efficiently deal with recurring and familiar issues, introducing new issues is likely to lead to initial periods of uncertainty and mixed results.[156] Furthermore, the fact that procuring agencies

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"arbitrary and capricious;" also, agency officials have a "high degree of discretion").

[155] As briefly mentioned above, the "newness" of the increased emphasis on past performance at least partially negates the advantage of having an established bid protest system. With a new concept, even an established system requires time to develop expertise in an unfamiliar area.

[156] *See* Schooner, *supra* note 1, at 82, 96 note 251 (explaining that "precedent" in the bid protest system "increases certainty"); *see also*, Office of General Counsel, United States General Accounting Office (GAO), Bid Protests at GAO: A Descriptive Guide, GAO.OGC 96-24, Background ("[o]ver the years, the decisions of the Comptroller General...in bid protest cases have resulted in a uniform body of law applicable to the procurement process that is relied upon by the Congress, courts, contracting agencies, and the public") *available at* www.gao.gov ("Legal Products," "Bid Protests," "Regulations," and "Revised Bid Protest Guide") (last visited Aug. 24, 2001).

themselves have been in an ongoing process of accumulating experience with past performance information and developing and revising guidelines for the use of past performance information, makes it even harder for the bid protest fora to deal with these issues.

Another problem with using bid protests to resolve past performance problems concerns the GAO specifically. Arguably, one of the most compelling reasons for GAO bid protest jurisdiction is to provide for simplified and expedited resolution of protests in an administrative, rather than judicial forum.[157] However, the very nature of past performance may frustrate this purpose and arguably detract from the simple and quick resolution of protests on other grounds more suited to the GAO forum.

For example, in preparation for a bid protest involving past performance issues, among other things, the agency may have to gather records from the contractor's references. Because the contractor may have accomplished its previous government work with one or more different agencies, these records may also have to be gathered from different agencies. This means past performance data will have been collected and rated by one agency before it is used as an evaluation factor by another. Losing something in the translation or transmission of that data to the source selection process is distinctly possible, if not likely. The problem may be with the other contracting agency's original performance evaluations, with the procuring agency's use of them, or somewhere in between. Additionally, the various agencies may have different cultures resulting in differing standards, priorities, tolerances for error, etc. As a result, the only mechanism for

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[157] *See* GAO Descriptive Guide, *supra* note 156 ("filing a bid protest with the GAO is easy and inexpensive and does not require...an attorney. In addition, matters can usually be resolved more quickly by protests filed with [the] GAO than by court litigation").

sorting out the facts may be to draw the agency that originally collected the performance data into the procuring agency's bid protest regarding an entirely different contract. This is certainly not the usual course for resolving bid protests and seems prone to lengthen and complicate the process.

Another potential problem area for contractors with respect to the GAO and past performance issues is the limitation of discovery.[158] For most other protestable issues, the administrative record arguably provides a sufficient factual record to determine whether or not agency action was proper. Past performance issues however, by their nature, likely require more. Because of the distinct collection and use phases, the background of a past performance problem in a source selection may extend beyond, or lie entirely outside, the bounds of the administrative record. In resolving the problem it may be useful, for example, to depose the members of the past performance evaluation team or the official who conducted the performance review on the relevant prior contracts.

b. Lack of Timeliness for Part 42 Industry Concerns

Lastly, and perhaps most importantly, as briefly mentioned above, bid protests do not provide a timely avenue for contractors to challenge FAR Part 42 collection and evaluation issues. For example, by the time an evaluation from a previous contract becomes an issue in a source selection giving rise to a bid protest, it may be difficult for the contractor to find witnesses who remember details about the previous contract.

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[158] *See* Kovacic, *supra* note 153, at 479-80 (citing 4 C.F.R. §§ 21.1(c)(1)-(6) (1994)).

3. Making the Best of Bid Protests

Notwithstanding the above-mentioned problems with past performance concerns being handled through bid protests, these protests remain the main avenue for contractors to resolve all of their past performance concerns (including FAR Part 42 concerns). Thus, contractors need to consider making strategic forum choices to protest past performance issues in order to gain as many advantages as possible. For example, in a factually complicated case, in order to avail itself of the various discovery tools, a contractor should consider protesting to the COFC.[159]

V. Does Industry Need More?

A. Judging the Current Past Performance System

In addition to looking closely at industry concerns and the potential problems for contractors in dealing with the increased emphasis on past performance, actually measuring how the past performance system is doing is also important. While measuring and quantifying whether a system such as the federal procurement system's past performance scheme has been successful may be valuable, it is not an easy task.[160]

The federal government focused on this measurement issue in the Government

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[159] *Id.* at 479 (unlike the GAO, the COFC more readily permits discovery tools such as depositions, interrogatories, etc.).

[160] *See, e.g.*, Schooner, *supra* note 1, at 107 (citing OSBORNE & GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 354). Furthermore, while introducing the Government Performance and Results Act (*see infra* note 161), the Senate even admitted that not all government programs could be easily measured. *Id.* at 107 note 281 (citing Sen. Rep. 103-58 at 16 (June 16, 1993)).

Performance and Results Act (GPRA) of 1993.[161] Essentially, the Act sought "to improve the efficiency and effectiveness of federal programs... and to eliminate wasteful performance practices" by requiring agencies to make strategic plans and measure and report performance.[162]

The procurement community's answer to the GPRA is found in the Procurement Executives Council (PEC)[163] Governmentwide Acquisition Performance Measurement Program.[164] The governmentwide procurement measures decided on by the PEC Performance

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[161] Pub. L. No. 103-62 (1993), codified at 5 U.S.C. § 306; 31 U.S.C. § 1105(a)(28); 31 U.S.C. § 1115 *et seq.*; and 39 U.S.C. § 2801 *et seq.*

[162] NASH, SCHOONER, & O'BRIEN, *supra* note 22, at 276. In summary, the Act

> "[r]equires executive agency heads to submit to the Director of the Office of Management and Budget (OMB) and the Congress a strategic plan for performance goals of their agency's program activities...and [r]equires [the] agency heads to report annually...on program performance...setting forth actual program performance..."

Pub. L. 103-62, Bill Summary and Status for the 103rd Congress (summary as of Jun. 23, 1993).

[163] *See supra* note 146 for a discussion of the PEC.

[164] The handbook for this measurement program (Procurement Executives Council (PEC) Measurement Handbook) is available at www.pec.gov/documents/measprogh.pdf (last visited Aug. 24, 2001). The PEC Performance Measurement Committee created this measurement program. They were chartered by the PEC to:

> create, document, and maintain a strategic performance measurement and management framework to advance the acquisition community's progress towards reaching the vision for the Federal Acquisition System--to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives.

PEC Measurement Handbook, 1.

Interestingly, although the above vision of the Federal Acquisition System does not mention the words "business" or "business-like," the PEC's vision for both the acquisition system and the acquisition workforce focuses primarily on a "business approach" to federal acquisition. *See* Strat (continued...)

Measurement Committee were: purchase cards; competition; cost-to-spend; small business goals; commercial items; cost, schedule, and performance; performance-based service contracting; and education and training.[165] Of these eight selected measures, four are arguably applicable to the increased emphasis on past performance. Furthermore, other measures in addition to the PEC-selected measures might also be useful in determining how the current past performance system is doing.

1. Cost-to-Spend (i.e. Efficiency)

As one would expect from the title, the objective for the "cost-to-spend" measure is to "maximize the *efficiency* of the procurement system relative to purchasing costs."[166] Perhaps the greatest benefactor of the 1990 acquisition reform movement (along with discretion) was efficiency.[167]

Plan 2000, *supra* note 146 and Strat Plan 2001-2005, *supra* note 146, at 1-2; *see also,* Schooner *supra* note 1, at 109. Professor Schooner points out that although the vision for the acquisition system does mention some of the fundamental government procurement principles—"integrity, fairness, and openness," the focus is on business. *Id.* at 109-10; 110 note 284.

[165] PEC Measurement Handbook, *supra* note 164, at app. A. Interestingly, the Committee chose not to make "customer satisfaction" a governmentwide measure based on the fact that it admittedly could vary widely from agency to agency. *Id.* at 3, para. G. This highlights a previously mentioned industry concern with the increased emphasis on past performance: the large amount of subjectivity and discretion involved with the past performance process. *See supra* notes 121-122 and accompanying text.

[166] PEC Measurement Handbook, *supra* note 164, app. A (emphasis added).

[167] *See* Schooner, *supra* note 1, at 4 (calling "efficiency" and "discretion" "facially attractive norms" elevated by the acquisition reform movement—"at the expense of other established...norms...transparency, integrity, and competition"). Note, Professor Schooner distinguishes "efficiency" ("buyers purchase quality at good prices") and "administrative efficiency"' ("fewer buyers conduct more purchases in a timely fashion"). *Id.* at 57-58. However, for purposes of this paper, I will not make such a distinction. Rather, I will use a general (continued...)

The fact that contractors are limited to interim assessments (if available) and agency reviews for challenging FAR Part 42 collection concerns in the current past performance system, admittedly adds to the efficiency of the system. By keeping any challenges to a performance evaluation under FAR Part 42 within the agency, the system works faster and spends less money. Furthermore, by only allowing contractors to challenge FAR Part 42 past performance issues outside the agency once they file a bid protest in a future contract competition (under FAR Part 15), also adds to the efficiency of the system. Contractors may choose not to pursue the issue because the issue happened so long ago or contractors may just wrap the issue up into a bid protest they were already going to file anyway. Thus, the current scheme arguably achieves this efficiency measure.

Without question, efficiency benefits the federal procurement system. Saving time and money makes taxpayers happy; especially after some of the government procurement "scandals."[168] However, efficiency alone is not enough for a procurement system to function effectively. OFPP Administrator, Angela B. Styles, recently argued that we must "balance the obvious benefits of increased efficiencies with the maintenance of fundamental concepts of

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definition of efficiency—"[t]he quality...of [a]cting or producing effectively with...minimum...waste, expense, or unnecessary effort. THE AMERICAN HERITAGE DICTIONARY 440 (2d College Edition 1982). *See also Developments*, *supra* note 15 (OFPP administrator Angela B. Styles acknowledging the benefits of the increased efficiency resulting from the 1990 acquisition reform movement but cautioning that some principles "cannot be compromised in the name of efficiency").

[168] The general public perception of the federal procurement system is not always positive. For example, when people found out I was going to be studying government contract law for my Master of Laws (LL.M.) degree, several of them jokingly asked me if I was going to learn "how not to buy a $10,000.00 toilet seat or a $5,000.00 hammer."

competition,...integrity, and transparency."[169]

2. Discretion

Although not a PEC-selected measure, increased agency discretion (along with efficiency) was a key result (and arguably a priority) of the acquisition reform movement of the 1990s.[170] While acquisition reform proponents like Dr. Kelman may favor the added discretion because it gives the government more options and makes it more "businesslike," others are concerned with the added discretion. For example, Professor Schooner has great concern with the "dramatic increase" in buyer discretion, especially when combined with the reduction in the oversight of the acquisition process.[171] This concern seems specifically warranted in the current past performance system.

As discussed above, one of the industry concerns with the current past performance system is the subjectivity involved with the process leading to among other things, added discretion to contracting officers.[172] Adding fuel to the fire, as discussed above, contractors are

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[169] *Developments*, *supra* note 15. *See also,* Schooner, *supra* note 1, at 104 (stating that striking a balance between competition and efficiency "is the ultimate hurdle facing acquisition reform").

[170] *See supra* note 167; *see also* Schooner, *supra* note 1, at 55 (stating that after the 1990 reform movement, today's government acts more "businesslike" and provides for much more buyer discretion).

[171] *See, e.g.,* Schooner, *supra* note 1, at 55 (calling the dramatic increase in buyer discretion along with the "corresponding reduction in both internal and external oversight of the process "troubling"). As for the attempts to make government more "business-like," Professor Schooner warns that we must not forget that government is different than the private sector. *Id.* at 111. For example, the government does not have a profit motive and the government works under strict legal and policy constraints. *Id.* at 111-13.

[172] *See supra* notes 121-122 and accompanying text.

limited to agency-level reviews if they want to timely challenge FAR Part 42 collection and evaluation concerns.[173] Putting all of this together, we have exactly the combination that contractors fear: more discretion with less oversight.[174]

3. Cost, Schedule, and Performance

The objective of the "cost, schedule, and performance" measure is simply to "achieve project, schedule, and performance requirements."[175] Similar to the "cost-to-spend" measure (or efficiency measure) discussed above, the fact that contractors are limited to agency interim assessments (if available) and agency reviews for FAR Part 42 collection and evaluation concerns, admittedly helps with cost and scheduling. By keeping within the agency any challenges concerning past performance collection and evaluation issues under FAR Part 42, the system arguably works for less money and is faster. Again, however, while saving money and time is important and beneficial to the government, these savings alone are not enough to sustain our procurement system.[176]

As for the "performance requirement" aspect of this measure, contractors are realizing that they are basically stuck with the agency's performance evaluation until a future bid protest potentially involving a completely different contract and agency. Accordingly, contractors may be

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[173] *See supra* notes 132-139 and accompanying text.

[174] *See supra* note 171.

[175] PEC Measurement Handbook, *supra* note 164, at app. A.

[176] The first two parts of this measure (cost and schedule) sound very similar to efficiency and thus the analysis is essentially the same. *See supra* notes 168-169 and accompanying text.

more motivated to ensure they meet (or exceed?[177]) all performance requirements in order to avoid any chance for a negative performance evaluation. While contractors meeting and exceeding performance requirements in general is beneficial for the government, this negative motivation may begin to take its toll on contractors—eventually possibly adversely affecting competition.

4. Competition and Small Business Goals

Interestingly, while competition was not even mentioned in the Vision for the Federal Acquisition System,[178] it is a measurement category with the objective of making "maximum use of competitive procedures to obtain best value and promote fairness."[179] Competition is also "fundamental norm" of the procurement process.[180] As such, it is discussed in more detail below under the importance of addressing industry concerns.[181] Suffice it to say however, several aspects of the implementation of the increased emphasis on past performance arguably do not meet the above-stated objective of competition.

The small business goals measure is related to competition in that its objective is "to ensure that a fair proportion of the total [government] purchases and contracts...are placed with

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[177] *See supra* note 75 and accompanying text.

[178] *See* Strat Plan 2000, *supra* note 146; s*ee also,* Schooner, *supra* note 1, at 110 note 284 ("[c]ompetition...receives no recognition").

[179] PEC Measurement Handbook, *supra* note 164, at app. A.

[180] *See supra* note 15 and accompanying text. The other two "fundamental norms" are integrity and transparency. *Id.*

[181] *See infra* notes 203-205 and accompanying text.

small business enterprises."[182] Unfortunately, the past performance system may be neglecting this measure. For example, many new contractors without a past performance history are likely small businesses.[183] Thus, small businesses may be the hardest hit if one of industry's concerns about past performance has merit or is even perceived to have merit—that contractors without a past performance history do not actually receive a "neutral rating."[184] As a result, small businesses may choose not to compete for federal government contracts.

5. Other Measures

In analyzing the performance of a system (such as the current past performance system), one might consider additional measures such as: timeliness, relevancy, and fairness.

a. Timeliness

As for timeliness, the current past performance system poses potential problems for contractors. As discussed previously, the only timely avenues for contractors to challenge FAR Part 42 collection and evaluation concerns are avenues within the agency that made the initial decision (higher-level agency review or interim assessments). If contractors want to complain outside the agency, they must wait until the FAR Part 42 collection and evaluation becomes a concern in a new contract competition—using a bid protest. By the time this happens, it may be difficult to find witnesses who remember details, etc. Furthermore, if the new contract

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[182] PEC Measurement Handbook, *supra* note 164, at app A.

[183] Many larger businesses (e.g. Lockheed Corporation), are seasoned contractors with a significant past performance record.

[184] *See supra* note 82 and accompanying text for a discussion on these "neutral ratings."

competition involves a different agency, it may be difficult to bring in a witness from another agency and a different contract. Hence, the current past performance system is lacking in the area of timeliness for contractors under FAR Part 42.

b. Relevancy

Relevancy is another measure where a contractor may have problems with the current past performance system. For example, when a contractor challenges a FAR Part 42 collection and evaluation issue during a later bid protest involving a different agency and/or a different contract, the contractor's concerns with the previous collection and evaluation are more relevant to the previous contract than they are with the current contract award competition. More specifically, with the current system, while pursuing a new and entirely different contract, a contractor may be forced to deal with facts and witnesses pertaining only to the previous contract and having nothing to do with the current contract award.

Furthermore, the new contract maybe for an entirely different product or service—bringing the relevancy of the prior past performance further into question. The bottom line is that relevancy is lacking in the current past performance system.

c. Fairness

This measure is as straight-forward as it sounds. The increased emphasis on (and therefore increased importance of) past performance, coupled with the large amount of discretion given to contracting officers in evaluating performance, makes it unfair to not allow contractors a legitimate timely avenue to challenge FAR Part 42 collection and evaluation concerns.

I agree with Lt Col Causey that from a purely legal standpoint, the past performance

system is sound.[185] After extensive analysis, he found the current past performance system does not cause de facto debarments or violate contractors' due process rights.[186] However, I do not agree with his statement that the system balances the government's need for efficiency with the "contractor's need for a *fair* opportunity to rebut adverse information."[187] Based on the potential negative consequences that may result from a poor past performance evaluation,[188] a contractor should be allowed the means to effectively and timely challenge a FAR Part 42 evaluation.

B. Why are these Industry Concerns So Important?

In order for a federal procurement system to function effectively and fairly, certain norms or policies should be present. These norms include integrity, transparency, and competition.[189]

1. Integrity

Beginning with integrity, while some foreign countries might be impressed with the integrity of our procurement system,[190] we must work to maintain integrity in the system.

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[185] *See* Causey, *supra* note 1 at 691. Although Causey finds no legal holes in the system, he does recommend the FAR be revised to require agencies to clarify adverse past performance information where the contract was awarded without discussions and past performance was the "determining factor in the award decision." *Id.*

[186] *Id.*

[187] *Id.* (emphasis added).

[188] Lt Col Causey concedes that negative consequences may result from a poor past evaluation. *Id.*

[189] *See supra* note 15 and accompanying text. Professor Schooner expands these "fundamental norms" out into: "high standards of individual and institutional integrity," "system transparency," and "robust competition." Schooner, *supra* note 1, at 103.

[190] *See* Schooner, *supra* note 1, at 68 note 167.

Integrity involves many issues such as "conflicts of interest, gratuities, bribes, handling and disclosure of proprietary source selection information...."[191] If industry perceives our procurement system lacks integrity, it will lose confidence and trust in the system.[192] This eventually could lead to a decrease in competition for contracts--which could lead to higher prices.

More specifically in the past performance arena, for example, with the increased focus on cooperation, customer satisfaction, and business-like concern for the customer's interest,[193] contractors may begin to believe that in order to receive anything better than a "satisfactory,"[194] they essentially have to become "buddy-buddy" with the agency contracting officer[195] and/or give the agency items/services not called for in the contract—e.g., a "freebie."[196] More importantly, if contractors have a concern with any of this under FAR Part 42 during the collection and evaluation of past performance information, they are limited to a timely agency review or untimely

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[191] *Id.* at 68 note 169.

[192] *Id.* at 104 (discussing the "overarching theme of public trust").

[193] *See supra* note 21 (these traits are part of the FAR's Part 42 definition of past performance information).

[194] *See supra* note 75.

[195] *See* Schooner, *supra* note 1, at 104 (when contracts are "administered based on friendships...the system suffers").

[196] *Id.* at 114 (a basic principle of government contracts is that a contractor cannot give "freebies" to the government to gain a competitive edge). Interestingly, during an ABA survey regarding the increased emphasis on past performance, "32% of the government respondents indicated that using past performance has produced improvements in contractor performance and *attitude.*" *See* West & Schechter, *1999 Year in Review*, *supra* note 10, at 14-7 (emphasis added).

bid protest review. This quandary may begin to "chip away" at the industry's perception of the procurement system's integrity—eventually leading to a decrease in competition.

2. Transparency

As for transparency, industry must be able to know in advance what the government will buy and when the government will buy it and must now how the procurement system operates.[197] Industry must also be able to understand the rules and have a way to ensure they are followed.[198] As with integrity, if industry perceives there are parts of the procurement process that it is not seeing, or there are rules that are not clear or are not being followed and it cannot do anything about it, contractors may begin thinking twice before participating in the procurement process. Of course, this would also lead to a decrease in competition.

For example, looking specifically again at the increased emphasis on past performance, one of the industry concerns is the subjectivity involved in the past performance process leading to increased discretion for the contracting officers (e.g., in deciding on how to evaluate a contractor on performance, in deciding what past performance information is relevant, etc.).[199] This increased discretion might lead to industry viewing the procurement process as less transparent--they cannot "see" a contracting officer's thought process while he is exercising his

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[197] *See* Schooner, *supra* note 1, at 104.

[198] *Id.* at 105 (citing Sue Arrowsmith, *Towards a Multilateral Agreement on Transparency in Government Procurement,* 47 INT'L & COMP. L.Q. 793, 796 (1998)).

[199] *See supra* notes 121-122 and accompanying text.

discretion.[200]

More significant for purposes of this paper however is the lack of system transparency caused by a lack of an effective and timely means for contractors to challenge FAR Part 42 concerns with the collection and evaluation of past performance information. By not allowing contractors to timely challenge FAR Part 42 concerns to anyone but the agency through interim assessments and higher level agency reviews,[201] contractors may perceive the government is trying to hide something in not allowing them to go outside the agency for review. Furthermore, with all of the discretion given to contracting officers as to where to obtain past performance information,[202] contractors may not learn of a past performance reference for the first time until the middle of a new procurement. The lack of transparency in the system caused by these issues may keep some contractors from participating in the process—again hurting competition.

3. Competition

Adequate competition in the procurement process is crucial in ensuring the government receives the best price and quality in what they purchase.[203] An area of past performance that may have a *direct* negative effect on competition is the "neutral rating" for new contractors who do

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[200] *See* Schooner, *supra* note 1, at 105-06 (arguing that Dr. Kelman and his acquisition reform initiatives favored increased discretion for contracting officers which "could be antithetical to certain perceptions of transparency").

[201] *See supra* notes 132-139 and accompanying text for a discussion on the limitations of these two avenues.

[202] See supra notes 84 and 129-130 and accompanying text.

[203] *See* Schooner, *supra* note 1, at 104.

not have a past performance history.[204] Each agency must come up with its own system of ensuring a contractor without a past performance history is not treated "favorably or unfavorably."[205] If new contractors perceive the system penalizes them for not having a past performance history and they do not have a chance against contractors who have had prior contracts, they may decide it is not worth the effort to compete for new contracts.

Additionally, competition is also affected *indirectly* by the other fundamental norms in the procurement system. In other words, if the system lacks integrity or transparency, this may begin to negatively affect competition.

VI. What, If Anything, Should be Done?

Both the government and industry alike agree that the increased emphasis on past performance in the federal procurement system generally makes sense.[206] The actual implementation however has raised concerns.[207] A specific concern for this thesis is the fact contractors do not have a legitimate timely means by which to challenge a FAR Part 42 collection and evaluation concern. Several potential options exist for addressing this concern.

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[204] *See supra* note 82 for a further discussion on the "neutral rating."

[205] *Id.*

[206] *See supra* note 7 and accompanying text.

[207] *See supra* note 8. It is not just industry who has concerns with how the 1990s' acquisition reform (which includes the increased emphasis on past performance implementation) has been implemented. *See, e.g., Developments, supra* note 15 (OFPP administrator, Angela B. Styles, expressing her concern to a Senate panel about the acquisition reform movement suffering from "significant implementation confusion").

A. Status Quo

The first option is to keep the past performance system as it is—in other words, do not give contractors anything more to challenge their FAR Part 42 collection and evaluation concerns. Potential arguments for this option are that the current system is legally sufficient and that the current system is efficient.

1. Legally Sufficient Argument

As briefly mentioned above, Lt Col Causey is a proponent of this argument.[208] Specifically with regard to the FAR Part 42 collection and evaluation phase, he states further that by allowing contractors 30 days to comment on an evaluation and by allowing for an agency review above the contracting officer, the current past performance system "more than adequately safeguard[s] the contractor's interests in an agency's contract performance report."[209]

While I agree that the current past performance system is legally sufficient, I am not convinced that a process which limits timely review to the same agency with which there is a concern, "more than adequately safeguards" a contractor's interest.[210] With the large amount of discretion given to contracting officers in making past performance collection and evaluation

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[208] *See supra* notes 185-186 and accompanying text.

[209] Causey, *supra* note 1, at 685.

[210] An analogy might be made here with the disputes process--that process similarly begins by the contractor submitting a "claim" to the agency's contracting officer. However, the key difference there is that once the contracting officer issues his final decision, if the contractor is not satisfied with the decision, he can appeal outside of the agency to the Court of Federal Claims (COFC) or the agency's board of contract appeals.

decisions, coupled with the importance of these evaluations to the future of the contractors involved, contractors arguably need more than an agency review to keep these contracting officer performance evaluations in check.[211] Although used in a slightly different context, the Scanwell Court[212] expressed a similar concern:

> When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary and capricious action of a governmental agency or official in ignoring those procedures can vindicate their real interests, while at the same time further the public interest....[213]

2. System Efficiency Argument

As mentioned above, by not allowing contractors to timely challenge a FAR Part 42 collection and evaluation concern outside of the agency, the past performance system is arguably more efficient in that it saves time and money.[214] In fact, one of the goals of the federal acquisition reform movement of the 1990s was to enhance efficiency and to save money.[215]

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[211] Of course, bid protests are also available to keep the contracting officers in check. As discussed previously however, a bid protest is too late in the process to effectively deal with FAR Part 42 collection and evaluation issues.

[212] Scanwell, *supra* note 88.

[213] Schooner, *supra* note 1, at 81 (citing Scanwell, *supra* note 88, at 864). Although the court was specifically talking about the importance of "private attorneys general" in the bid protest system, this language is also appropriate for the "agency-only review" concern regarding past performance.

[214] *See supra* notes 166-169 for further discussion on "efficiency."

[215] *See* Schooner, *supra* note 1, at 57. No one doubts Dr. Kelman was successful in getting Congress to make the procurement process more efficient. *See id.* at 59.

While efficiency is a commendable goal, it should not be the "end all, be all" goal of the federal procurement system. Beyond the efficiency of the system, one should also ask whether the system promotes other important measures such as timeliness, relevancy, and fairness. Furthermore, one should ask whether the system promotes the fundamental norms of integrity, transparency, and competition. OFPP administrator, Angela B. Styles, has argued along the same lines claiming this "the efficient procurement model" has "undercut" the "principles of competition and fairness."[216]

Lastly, many government contracts take several years from the beginning of the contract to contract completion. Thus, the amount of time it might take to appropriately resolve a contractor's concern over a FAR Part 42 collection or evaluation *during contract performance*, might be relatively insignificant as compared to the contract itself.[217]

Notwithstanding the above arguments for maintaining the status quo, I do not believe maintaining the status quo is a good option. Legal sufficiency and system efficiency simply cannot overcome the void remaining in the system by not providing contractors a legitimate timely means to challenge the collection or evaluation of past performance. Contractors need this void filled for timeliness, relevancy, and fairness reasons. The procurement system needs this void filled in order

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[216] *Developments, supra* note 15.

[217] Interview with Mr. West, *supra* note 8. Mr. West provided the following analogy—if a 24-hour clock represents the amount of time the world has existed, then mankind's existence in this world might be represented by 1 minute. Similarly, if a 24-hour clock represents the amount of time a typical contract might take from beginning to end, then the amount of time it might take to resolve past performance evaluations during contract performance might also be represented by 1 minute. *Id.*

to maintain integrity, transparency, and competition in the system.

B. Contract Disputes Act (CDA)/Administrative Procedure Act (APA)

The Contract Disputes Act (CDA)[218] and the Administrative Procedure Act (APA)[219] might provide interesting yet untested avenues for contractors to timely challenge faulty collection or evaluation of past performance under FAR Part 42. Under the CDA, the faulty collection and/or evaluation might be reviewed as a "claim."[220] Under the APA, the faulty collection and/or evaluation might be considered a "legal wrong" caused by an "agency action."[221]

However, because both of these avenues are untested, it is unclear whether such reviews would be available.[222] Furthermore, a lack of urgency during collection and evaluation may keep contractors from pursuing these avenues. For example, a contractor has no way of knowing for sure whether a questionable performance review will materially affect, or even ever be considered, in a future procurement. Some parties may simply decide it is better to take a chance than to

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[218] 41 U.S.C. § 601 *et seq.* (1978) (this act provides detailed procedures for resolving disputes during contract performance). *See* Goodrich, *supra* note 28, at 1622 (raising the CDA as a possible, yet untested, avenue for contractors to challenge FAR Part 42 past performance concerns).

[219] 5 U.S.C. § 701 *et seq.* (1996).

[220] *See* 41 U.S.C. § 605(a) (1987); *see also* 48 C.F.R. § 52.233-1 for a more detailed definition of a "claim."

[221] *See* 5 U.S.C. § 702 (1996).

[222] *See* Goodrich, *supra* note 28, at 1622 ("the legal questions regarding the availability of the Contract Disputes Act review have not yet been answered").

spend time and resources on litigation that may ultimately be moot.[223]

This raises an interesting analogy. In the contract disputes arena, the boards of contract appeals (BCAs) have created and applied the "Fulford Doctrine."[224] Contractors who are terminated for default run the risk of being assessed excess costs of reprocurement by the government.[225] However, these costs are normally not assessed at the time of the default termination.[226] Sometimes the only reason a contractor might appeal a default termination would be to avoid these excess costs of reprocurement. Thus, the BCAs have allowed contractors in these types of situations to wait to appeal a default termination, beyond the time for a timely appeal, until excess reprocurement costs are assessed, if they are assessed.[227]

In our current past performance scenario, contractors essentially have the benefit of an implicit "Fulford Doctrine." Specifically, contractors are allowed to raise FAR Part 42 collection and evaluation concerns much later in a FAR Part 15 bid protest contest even if they did not timely challenge (to the agency) the FAR Part 42 collection and evaluation during the prior

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[223] *See id.* (the Contract Disputes Act avenue "would be time consuming and potentially expensive").

[224] This doctrine was originally derived from Fulford Mfg. Co., ASBCA 2143 & ASBCA 2144 (1955).

[225] *See* JOHN CIBINIC JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 998 (3d ed. 1995).

[226] *Id.*

[227] *Id.* at 998-99. Essentially, this keeps contractors from appealing unless they really must (i.e., in order to avoid excess costs of reprocurement). The Fulford Doctrine therefore, potentially saves both the contractor and the government time and money required for otherwise unnecessary appeals.

contract.

However, the benefit of being able to raise past performance collection and evaluation concerns later in a FAR Part 15 bid protest, even if a timely agency challenge was not made earlier under FAR Part 42, is minimal (especially when compared to the default termination "Fulford Doctrine"). For example, the time and money saved by a contractor not providing comments or additional information to the agency in 30 days, in order to challenge a FAR Part 42 collection or evaluation concern, is small. This is especially true when compared to the time and money saved by a contractor not going through the disputes process to challenge a default termination. Also, waiting to see if a FAR Part 42 collection or evaluation concern becomes an issue in a future contract award contest likely will negatively affect contractors. For example, the fact that a potentially large amount of time might pass before the next contract award competition or the fact that the next contract award competition for a contractor might involve a completely different agency, will complicate matters for a contractor waiting to challenge a FAR Part 42 issue. With default terminations on the other hand, waiting to see if excess costs are assessed is not as big of an issue because it will likely not take has long and will involve the same agency.

If the CDA (or APA) was allowed to be used as an avenue to challenge a FAR Part 42 collection and evaluation concern, then a "Fulford Doctrine"-like system might be more useful. It would allow a contractor to reserve his right to appeal under the CDA (or APA) regarding a FAR Part 42 collection or evaluation concern, should the collection or evaluation later become an issue. Practically speaking however, this will not work. The GAO, for example, is not going to delay a bid protest until after a contractor has had an opportunity to make a CDA or APA claim

on a past performance collection and evaluation concern.

Thus, while the "Fulford Doctrine" makes an interesting analogy, it makes more sense in default terminations than in past performance scenarios.

C. Past Performance Review Board

Another potential option for providing contractors a timely and effective avenue to address FAR Part 42 collection and evaluation concerns might be to establish a "Past Performance Review Board."[228] This review board would be comprised of administrative judges and serve all agencies as the one and only appeal avenue for contractors seeking timely redress of FAR Part 42 collection and evaluation concerns. The board would have jurisdiction over "final FAR Part 42 past performance evaluation decisions" by the agency. Similar to the "disputes" process, contracting officers would issue these "final decisions."[229] The current agency reviews occurring one level above the contracting officers would not be necessary and could be deleted. The board would use its unique expertise with past performance to expeditiously and effectively resolve FAR Part 42 past performance evaluation issues. Its findings would be final and binding for purposes of future protests in either the GAO or the COFC.

Such a board would provide contractors a timely way to receive a neutral and detached, "expert" review of their FAR Part 42 performance evaluation concerns. The board may also speed up the bid protest process later on because FAR Part 42 past performance issues will have

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[228] This option emerged during my interview and discussion with Mr. West, *supra* note 8.

[229] A "final decision" would provide the agency's view of the contractor's concern over the Part 42 performance evaluation and indicate whether the agency would be willing to change anything about their initial evaluation.

already been resolved. This should simplify the process because there will be less of a need to call on other agencies for information on past performance evaluations concerning other contracts during bid protests.

The past performance review board option however, is not without its drawbacks. The most obvious criticism of this option is the time, effort, and money required to establish a board specifically developed to handle such a small and specific area of procurement law.[230] Another criticism of this option might come from the contractors themselves. If such a board were to begin to establish a negative precedent for contractors in their FAR Part 42 past performance challenges, contractors would stop taking their cases to the board. After an unsuccessful review at the agency level, contractors would likely see themselves as better off simply leaving their disagreement documented in their comments/rebuttal instead of having an impartial board possibly find their concerns unwarranted.[231]

D. Alternative Dispute Resolution (ADR) at the Boards of Contract Appeals (BCAs)

Another option might be to turn to the ever-growing use of alternative dispute resolution (ADR). If a contractor remains dissatisfied after exhausting his agency review of his FAR Part 42

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[230] Mr. West and I discussed a possible analogy to this review board—the General Services Board of Contract Appeals' (GSBCA's) authority to resolve information technology (IT) protests. Interview with Mr. West, *supra* note 8. This authority was removed in 1996. Pub. L. No. 104-106, § 1501 (1996) repealing 40 U.S.C. § 759 (Brooks Act). *See generally* Schooner, *supra* note 1, at 22-23 (discussing GSBCA authority over IT protests and the number of such cases the GSBCA heard).

[231] *See* 48 C.F.R. § 42.1503(b) (providing that performance evaluation contractor comments/rebuttal "shall be retained [by the agency] as part of the evaluation").

collection and evaluation issues, at least one commentator recommends the use of ADR.[232] Specifically, he recommends modifying FAR 42.1503(b) by adding the underlined portions below:

> (b) Agency evaluations of contractor past performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. Alternative dispute resolution shall be employed where requested by the contractor when agreement cannot be reached. See [FAR] 33.214. [Continue as presently worded.][233]

Furthermore, the commentator (Mr Goodrich) recommends agencies consider possibly using the GSBCA as a forum for ADR because the GSBCA rules already provide that all agencies may use its services for ADR purposes, even if the issue at hand (i.e. dispute) is being handled by another forum.[234]

While an ADR option is appealing, I would make some changes to the above recommendation. First of all, instead of just requiring ADR in general, I recommend a rule with more direction—tell the agencies what type of ADR must be used. For example, the underlined addition to FAR 42.1503(b) above should dictate the type of ADR the agencies and contractors are required to employ. This way both the government and the contractors know what to expect every time.[235] As far as the type of ADR, I recommend something akin to binding arbitration so

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[232] *See, e.g.*, Goodrich, *supra* note 28, at 1623.

[233] *Id.*

[234] *Id.*

[235] For example, in response to the concern that a contractor's only timely avenue to challenge a (continued...)

that both sides are heard and a binding decision is provided.

Second, the language immediately following the underlined addition to FAR 42.1503(b) above should be deleted (i.e., "The ultimate conclusion on the performance evaluation is a decision of the contracting agency").[236] The ADR decision, not an agency decision, should be controlling--otherwise, the purpose of the contractor going outside of the agency for a neutral opinion is defeated.

Third, similar to the current Changes Clause,[237] language should be added requiring the contractor to proceed with contract performance while the ADR is proceeding.[238]

Lastly, instead of only using the GSBCA (as suggested above[239]), I recommend using all

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FAR Part 42 collection and evaluation issue is with the agency, the ABA has recommended an ADR-type of solution where a specific type of ADR is required. Specifically, the ABA Past Performance Subcommittee recommended making it mandatory that agencies select and appoint an ombudsman to independently review contractor challenges to FAR Part 42 past performance evaluations. *See* Joseph D. West and Robert J. Wagman, Jr., *Past Performance Information*, BRIEFING PAPERS, 99-10 (Sep. 1999) (citing Letter from ABA Section of Public Contract Law Past Performance Subcommittee to FAR Council, Re: Proposed revisions to FAR Past Performance Provisions 11 (May 6, 1999)). An ombuds is "[a]n individual who has been designated as a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver." Electronic Guide to Federal Procurement ADR *available at* http://www.adr.af.mil/iadrwg (last visited Aug. 24, 2001). The ADR Guide goes on to explain that the role of the ombuds "was intended to be an antidote to abuses of governmental and bureaucratic authority and administration, and ombuds may serve as effective intervenors in cases of arbitrary decision making." *Id.*

[236] 48 C.F.R. § 42.1503(b).

[237] *See* 48 C.F.R. § 42.243-1.

[238] *See* 48 C.F.R. § 42.243-1(e) (the Supply Changes Clause indicating that "nothing in [the] clause shall excuse the contractor from proceeding with the contract as changed").

[239] *See supra* note 234 and accompanying text.

of the BCAs. Even though the GSBCA rules already provide for all agencies using their forum for ADR purposes,[240] I see no reason why the other BCAs could not handle their own past performance ADR cases. The BCAs should process these past performance cases expediently so as to allow the parties to put closure to the contract. At the same time however, the BCAs should also ensure both parties have the opportunity to air their concerns.

Thus, I recommend FAR 42.1503(b) be changed to read as follows:

> (b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. *Alternative dispute resolution (ADR) in the form of binding arbitration shall be employed where requested by the contractor when agreement cannot be reached. The binding arbitration shall take place at the appropriate board of contract appeals. During the binding arbitration process, the contractor shall proceed with the contract. When binding arbitration is used,* the ultimate conclusion on the performance evaluation is *the arbitration decision*. Copies of the evaluation, contractor response, review comments, and *binding arbitration decision*, if any, shall be retained as part of the evaluation....[241]

One advantage to the ADR/BCA option is that the BCA system is already established. This saves time and money by not having to start a new forum or process from ground zero (as would be required with a past performance review board).[242] Also, this solution is consistent with

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[240] *Id.*

[241] 48 C.F.R. § 42.1503(b) (recommended changes in italics).

[242] *See supra* note 230 and accompanying text.

the trend over the last several years where federal agencies are being pushed to use ADR.[243] Next, an established forum, with a required ADR procedure, will be able to make precedent, thus providing for more predictability for both the government and contractors.[244] Finally, the BCA forum is neutral and detached and will hopefully be expedient.

Downsides exist to employing the ADR/BCA option. For example, although the BCA forum is already established, it will still take some time and money to "fine tune" the system specifically for the past performance cases. Furthermore, although the BCAs would hopefully provide for expedient and relatively inexpensive option for contractors, time and money would still be required for a contractor to pursue a past performance issue at the BCAs. Thus, similar to the lack of urgency concern discussed under the CDA/APA options above, contractors may simply decide to wait to see if the past performance issue becomes a factor in a future source selection.[245] Also, as discussed under the past performance review board option above, if contractors in general perceive a negative precedent for them on past performance issues in this forum, they may choose to simply take their chances and rely on their comments/rebuttal to the disputed past performance evaluation.[246]

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[243] *See, e.g.*, 48 C.F.R. § 33.214(b) (encouraging ADR in the acquisition process by requiring contracting officers and contractors to give a written explanation why ADR is not appropriate when ADR proceedings are requested by the other party).

[244] This helps resolve a concern commentators have expressed with the increased emphasis on ADR—very little precedent and lack of public access to decisions/settlements. *See, e.g.*, Schooner, *supra* note 1, at 30 notes 70-71.

[245] *See supra* note 223 and accompanying text.

[246] *See supra* note 231 and accompanying text.

Notwithstanding these negative aspects of the ADR/BCA option, I recommend the federal procurement system employ the ADR/BCA option to allow contractors a timely and effective means by which to challenge FAR Part 42 collection and evaluation issues. Of all the above options, it provides the most reasonable and realistic solution to the problems for contractors in challenging FAR Part 42 collection and evaluation concerns.

VII. Conclusion

Increasing the emphasis on past performance because it provides a good indicator for future contract performance makes sense. The increased emphasis on past performance offers the government the opportunity to discriminate between vendors and offers excellent contractors a competitive advantage. Nonetheless, private industry has expressed legitimate, complex and multifaceted concerns with the increased emphasis. Addressing these concerns is important—if contractors perceive an open and honest system, they will be more likely to compete in future contracts.

To analyze the source of these concerns and where they might be best resolved, I split the analysis up into two categories: collection and evaluation of past performance information and use of past performance information as an evaluation factor in source selection. This bifurcation coincides with the FAR's treatment of the increased emphasis on past performance under FAR Part 42, collection and evaluation of past performance information, and FAR Part 15, use of past performance as an evaluation factor in source selections.

After analyzing the industry concerns associated with past performance and where the concerns might be resolved, it seems contractors have no legitimate avenue to timely challenge

FAR Part 42 collection and evaluation concerns. Currently, contractors only have the limited procedural avenues in FAR Part 42 and interim assessments (if available) in order to timely challenge FAR Part 42 concerns. Both of these avenues, while timely, contain limitations for contractors in that the ultimate decision remains with the agency. In the meantime, contractors will likely continue to use the established bid protest system to challenge all past performance issues (including untimely FAR Part 42 collection and evaluation issues), outside of the agencies.

While the increased emphasis in past performance makes sense and the current past performance system is efficient, other important measures are lacking in the system due to contractors' inability to effectively and timely challenge a FAR Part 42 collection and evaluation issue (i.e., timeliness, relevancy, and fairness). Additionally, the current "efficient" method of dealing with contractor FAR Part 42 concerns could begin to negatively affect the fundamental norms of our procurement system: integrity, transparency, and competition.

Based on the above and after reviewing the advantages and disadvantages of maintaining the status quo and the advantages and disadvantages of the various options for changing the past performance system, the system needs more. A change is needed to provide contractors with a timely and effective method to challenge FAR Part 42 collection and evaluation concerns. To that end, I recommend the federal procurement system employ alternative dispute resolution (ADR) at the various boards of contract appeals (BCAs) in order ensure contractors have a timely and effective avenue for addressing FAR Part 42 past performance concerns.

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